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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Placer)

PLACER RANCH, INC., Plaintiff and Appellant, v. WESTERN PLACER WASTE MANAGEMENT AUTHORITY, Defendant and Appellant.	C040523 (Super. Ct. No. SCV2220)

The Western Regional Sanitary Landfill (the Landfill) is owned and operated by defendant Western Placer Waste Management Authority (the Authority). Plaintiff Placer Ranch, Inc. (Placer Ranch), owns property immediately adjacent to the Landfill. In 1994, Placer Ranch's predecessors in interest initiated this action against defendant claiming, among other things, that the Landfill was being operated in violation of the law and was creating a nuisance and a trespass to adjoining property.

During the ensuing years, changes were made to improve the operation of the Landfill. In August 2001, Placer Ranch declared victory and voluntarily dismissed the action. On October 16, 2001, the trial court awarded Placer Ranch attorney fees and costs under Code of Civil Procedure section 1021.5. (Further undesignated section references are to the Code of Civil Procedure.) On February 5, 2002, following a partial grant of the Authority's motion to vacate, the court entered a new order awarding the same attorney fees but slightly less costs.

The Authority appeals the award of attorney fees and costs. Placer Ranch cross-appeals from the court's failure to award additional fees for work done during the period between the court's initial order and its amended order. We reverse that portion of the court's orders awarding attorney fees and therefore need not reach the merits of the cross-appeal. We affirm the award of costs.

FACTS AND PROCEEDINGS

The Landfill is located on 320 acres in the unincorporated area of Placer County between the cities of Roseville and Lincoln, west of Highway 65 at the intersection of Athens Road and Fiddyment Road. It is owned by the Authority, a public agency created under the Joint Exercise of Powers Act (Gov. Code, § 6500 et seq.). In 1979, the Landfill began operations under a solid waste facility permit issued by the Placer County Department of Health and Human Services, the County's Local

Enforcement Agency (LEA). In 1994, Western Placer Recovery Company (WPRC) took over operation of the Landfill under a lease from the Authority.

Placer Ranch owns approximately 2,300 acres of land (Stanford Ranch West) immediately adjacent to the southern boundary of the Landfill. Since 1989, Placer Ranch intended to develop Stanford Ranch West into a "master-planned, mixed-use community to include residential, commercial, and industrial uses." At the time this case was filed, Stanford Ranch West was owned by Placer Ranch Partners, a limited partnership of which Placer Ranch was a general partner, and Placer Ranch 160, a joint venture. Placer Ranch Partners leased Stanford Ranch West to Stanford Ranch, Inc., under an agreement providing for Stanford Ranch, Inc., to develop the property and to share in the revenues generated.

On June 17, 1994, Placer Ranch Partners, Placer Ranch 160, and Stanford Ranch, Inc., initiated this action against the Authority, WPRC, Norcal Waste Systems, Inc. (the alleged parent of WPRC), Placer County, the Placer County Board of Supervisors, the Placer County Department of Health and Medical Services, and the Placer County Department of Public Works. The complaint alleged that the Landfill was being operated "in violation of federal, state, and county regulatory requirements" and "has caused repeated instances of noise, dust, litter, odor, and other adverse consequences to" Stanford Ranch West. It further alleged that the Landfill "has been accepting three times its maximum allowable amount of waste and has not properly screened

that waste to ensure that it does not include hazardous waste materials." According to the complaint, "noise, dust, odor, diminution in air and water quality, wind blown trash, solid waste lost from vehicles delivering material to the site and illegal dumping generated by the operation of the Landfill have been uncontrolled and/or negligently allowed to emanate from the Landfill and intrude onto adjacent land owned by and/or controlled by petitioners and plaintiffs." The complaint contained causes of action alleging, among other things, operation of the Landfill without a valid permit, violation of the California Environmental Quality Act (CEQA), violation of a Regional Water Quality Control Board order, violation of a conditional use permit, private and public nuisance, trespass, negligent misrepresentation, inverse condemnation, violation of civil rights, breach of contract, and negligence. The complaint sought declaratory relief, injunctive relief, damages, just compensation, specific performance of the "Joint Exercise of Powers Act Agreement" that formed the Authority, specific performance of the operating agreement between Placer Ranch Partners and WPRC, and attorney fees.

In February 1994, counsel for the plaintiffs sent the Authority a letter claiming that the creation of a non-residential buffer around the Landfill caused damages "in excess of $100,000,000, which equates to virtually the entire economic value of [Stanford Ranch West]."

After various demurrers and amendments to the complaint, a fifth amended complaint was filed on May 28, 1997, on behalf of

Placer Ranch. It alleged that Placer Ranch Partners had been dissolved and Placer Ranch had acquired its assets. The named defendants were the Authority, WPRC, and Norcal Waste Systems, Inc. The fifth amended complaint alleged private and public nuisance, trespass, inverse condemnation, and violation of civil rights and sought an injunction, damages, just compensation, attorney fees, and costs.

During the course of the sometimes exhaustive litigation, formal discovery disclosed that groundwater at the Landfill had been impacted by pollutants. "It was also discovered that the direction of the groundwater flow from the [Landfill] (containing contaminated groundwater), was in a south or southwesterly direction, directly toward [Placer Ranch's property]." Input from Placer Ranch and its experts was adopted by the Regional Water Quality Control Board (RWQCB) in a waste discharge requirement that included "the installation and placement of additional groundwater monitoring wells for [the Authority]'s perimeter groundwater monitoring system." The installation of over half the groundwater monitoring wells was established in part in response to comments submitted to the RWQCB by Placer Ranch. With the addition of seven perimeter gas extraction wells at the Landfill in response to Placer Ranch's multiple requests to administrative agencies for enforcement action, a methane gas problem at the Landfill was brought into compliance with state regulatory limits and standards. Remedial measures taken at the Landfill include new waste discharge reports, a "water quality monitoring program, a revised solid

waste facility permit, the installation of the extensive groundwater monitoring system and wells and the installation of an [*sic*] landfill gas collection and control system consisting of an extensive network of gas monitoring and extraction wells . . . ."

On April 10, 1998, Placer Ranch dismissed all claims against WPRC and Norcal Waste Systems, Inc. It also entered into a stipulation striking from the complaint all claims relating to the operational activities performed by those defendants, "including all claims relating to dust, litter, noise, vectors, illegal dumping, inadequate or daily cover of waste, improper or inadequate dewatering of sludge, surface leachate and erosion problems, sedimentation ponds draining from Landfill site, inadequate record keeping, and odor but only to the extent that the alleged odor is associated with [the parties'] operational activities or ommissions [*sic*] prior to the date of execution of this Stipulation and not to the extent the alleged odor is associated with the presence or migration of landfill gas generated over time by decomposing landfill refuse."

On August 9, 2001, Placer Ranch filed a request to dismiss the complaint without prejudice. The dismissal was entered the same day. On August 29, the Authority filed a memorandum of costs in the amount of $381,069.84, later amended to $382,729.84.

On September 4, 2001, Placer Ranch filed a motion for attorney fees and costs under section 1021.5. Placer Ranch

sought reimbursement for fees incurred in the prosecution of the lawsuit as well as fees associated with related administrative proceedings. Placer Ranch also filed a motion to tax the Authority's costs.

On October 16, 2001, the trial court ruled in favor of Placer Ranch as follows: (1) The motion for attorney fees and costs was granted in the amounts of $1.5 million and $706,281.52 respectively. (2) The motion to tax costs was granted. The Authority's request for specific findings to support the court's rulings was denied.

On October 30, 2001, the Authority moved to vacate the award of attorney fees. Among other things, the Authority sought an opportunity to conduct discovery on the reasonableness of the fees. On January 7, 2002, the court granted the Authority's motion in part. The court issued a new order to replace that issued on October 16. In the new order: (1) the motion to tax costs was granted; (2) Placer Ranch was declared the prevailing party; (3) the Authority's section 998 offer to settle for $200,000 was determined not to be reasonable; (4) the motion for attorney fees and costs was granted; (5) a hearing was set for February 5, 2002, to determine the amount of fees; and (6) the Authority was charged with the burden of establishing that the prior award was not reasonable.

On February 5, 2002, the court entered a new order awarding attorney fees and costs of $1.5 million and $636,624.01 respectively.

The Authority appealed the attorney fees award. Placer Ranch appealed the court's failure to award additional attorney fees for the period from October 16, 2001 through February 5, 2002.

DISCUSSION

I

Timeliness of Appeal

Placer Ranch contends defendant did not file its notice of appeal within the time permitted by law. Placer Ranch argues the normal time for appealing the October 16, 2001 decision was not extended by the Authority's motion to vacate, because that motion was not "valid." California Rules of Court, rule 2(a) gave the Authority 60 days from the notice of entry of the decision to file an appeal, "[u]nless a statute or rule 3 provides otherwise." (Further undesignated rule references are to the California Rules of Court.) Rule 3(b) reads: "If, within the time prescribed by rule 2 to appeal from the judgment, any party serves and files a *valid* notice of intention to move--or a *valid* motion--to vacate the judgment, the time to appeal from the judgment is extended for all parties until the earliest of: [¶] (1) 30 days after the superior court clerk mails, or a party serves, an order denying the motion or a notice of entry of that order; [¶] (2) 90 days after the first notice of intention to move--or motion--is filed; or [¶] (3) 180 days after entry of judgment." (Italics added.)

In *Lamb v. Holy Cross Hospital* (1978) 83 Cal.App.3d 1007, the Court of Appeal construed the term "valid" in rule 3(b) "to mean a motion based on some recognized grounds for vacation . . . ." (*Id.* at p. 1010.) According to the court, "the only grounds that have been recognized under rule 3(b) are motions based on section 663 of the Code of Civil Procedure, motions based on section 473 of that code, or a nonstatutory motion based on extrinsic fraud or mistake." (*Ibid.*)

The Authority's motion to vacate stated that it was based on section 663. That section reads: "A judgment or decree, when based upon a decision by the court, or the special verdict of a jury, may, upon motion of the party aggrieved, be set aside and vacated by the same court, and another and different judgment entered, for either of the following causes, materially affecting the substantial rights of the party and entitling the party to a different judgment: [¶] 1. Incorrect or erroneous legal basis for the decision, not consistent with or not supported by the facts; and in such case when the judgment is set aside, the statement of decision shall be amended and corrected. [¶] 2. A judgment or decree not consistent with or not supported by the special verdict."

Placer Ranch argues a judgment or decree that is subject to a motion to vacate involves a "two-step process: (1) issuance of a 'statement of decision' by the trial court following a bench trial on disputed issues of fact, and (2) issuance of a 'judgment' or 'decree' based on that statement of decision." According to Placer Ranch, the October 16 decision was not

subject to a motion to vacate, because it was a ruling on two separately filed motions rather than a judgment or decree, and the hearing on the motions was not a bench trial on disputed issues of fact and did not involve a statement of decision.

In its briefs on appeal, Placer Ranch cites no authority for its claim that a judgment or decree subject to a motion to vacate must be based on a statement of decision. The main body of section 663 says only that the judgment or decree must be "based upon a decision by the court." It does not say the decision must be embodied in a statement of decision. Where a point is raised in an appellate brief without argument or legal support, "it is deemed to be without foundation and requires no discussion by the reviewing court." (*Atchley v. City of Fresno* (1984) 151 Cal.App.3d 635, 647.)

At oral argument, Placer Ranch asserted that the requirement of a statement of decision comes from subdivision (1) of section 663, which requires that the statement of decision be amended whenever a motion to set aside a judgment is granted. We do not normally consider arguments made for the first time at oral argument. (See *People* v. *Harris* (1992) 10 Cal.App.4th 672, 686.) At any rate, in our view, the reference to a "statement of decision" in subdivision (1) requires that, in the event a statement of decision was issued, it must be amended whenever a motion to set aside the judgment is granted. Where no statement of decision was requested and issued, there is nothing to amend.

Placer Ranch next contends that the motion to vacate was not valid because it "failed to specify exactly what [the Authority] was seeking in a substituted decision or any proposed language that should have been substituted for the October 16, 2001 [d]ecision." Placer Ranch cites Weil & Brown, California Practice Guide: Civil Procedure Before Trial (The Rutter Group 2004) at section 9:38, pages 9(l)-20 to 9(l)-21, where the authors state: "The notice of motion must state in the *first* paragraph exactly *what* relief is sought and *why* (what grounds). [Citations.] [¶] The court cannot grant different relief, or relief on different grounds, than stated in the notice of motion. [Citation.]" Placer Ranch also cites section 9:39 of that treatise, where the authors say: "For example, a notice requesting that a prior order be 'clarified' is insufficient if it fails to specify the *particular interpretation* the moving party is seeking." (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial, *supra*, § 9:39, p. 9(l)-21.)

Placer Ranch also contends the motion to vacate was not valid because it "did not 'specify the particulars' in which the legal basis for the October 16, 2001 [d]ecision was not consistent with or supported by the facts." Section 663a reads: "The party intending to make the motion [to vacate] must file with the clerk and serve upon the adverse party a notice of his intention, designating the grounds upon which the motion will be made, and specifying the particulars in which the legal basis for the decision is not consistent with or supported by the facts . . . ."

Placer Ranch asserted many of these same arguments in support of two earlier motions to dismiss the appeal. We denied both motions. Undeterred, Placer Ranch apparently clings to the notion that the third time must be a charm. In this instance, it is not.

Although the Authority's notice of intention to move to set aside and vacate the October 16, 2001 decision stated only that the Authority was seeking entry of "another and different decision," without specifying what that decision would be, the memorandum supporting the motion adequately explained the basis for the Authority's claim and the relief sought. The Authority's motion requested an opportunity to litigate the amount of fees and costs. The Authority explained that, after the motions for attorney fees and to tax costs were filed, defense counsel informed counsel for Placer Ranch that he could not evaluate Placer Ranch's motion for fees without billing statements and cost invoices. According to the Authority, the parties thereafter agreed to bifurcate the issue of the amount of fees and costs. At the hearing, Placer Ranch presented no evidence to support the allocation or amount of fees and costs. Nevertheless, the court awarded Placer Ranch approximately $2.2 million.

The Authority argued that the award "is inconsistent with and/or not supported by the facts" because, in light of the bifurcation agreement, Placer Ranch presented no evidence to support the amount of fees claimed and the Authority "was deprived of the opportunity to effectively challenge the basis

for the alleged fees and costs." The Authority sought vacation of the decision and a new decision "that allows the parties to conduct post-hearing discovery on the reasonableness of [Placer Ranch's] claimed attorneys fees and costs, followed by a hearing in which the Court determines what amount, if any, [Placer Ranch] is entitled to recover as fees and costs." The Authority adequately stated the basis for its motion and the relief sought.

Placer Ranch contends the Authority's motion to vacate was not valid because it challenged the sufficiency of the evidence to support the legal conclusions reached by the trial court. Placer Ranch argues a challenge to the sufficiency of the evidence must be made by a motion for new trial, not a motion to vacate.

We are not persuaded. The Authority's motion to vacate challenged the sufficiency of the evidence only insofar as it claimed the court reached an issue not tendered, i.e., the amount of fees and costs. The Authority claimed the issue before the court on October 16, 2001, was whether plaintiff was entitled to attorney fees and costs, not the amounts thereof. The Authority claimed the amounts had been bifurcated for later determination and, therefore, the parties had not presented evidence on the issue. In its motion to vacate, the Authority sought an opportunity to conduct discovery and to present evidence on the reasonableness of Placer Ranch's fees and costs. Thus, the Authority was not challenging the sufficiency of the evidence but the regularity of the proceedings.

Placer Ranch contends the Authority's assertion in its motion to vacate that there was an agreement to bifurcate was an attempt to make an "'end run' around its ill-advised decision not to challenge the amount of fees and costs claimed by [Placer Ranch] . . . ." Placer Ranch contends this was an improper attempt to introduce new evidence in connection with the motion.

We disagree. If, as the Authority asserted, there was an agreement to bifurcate and decide later the issue of the amount of fees and costs, and the parties did not present evidence on the issue, it was not proper for the court to decide the issue. The Authority was justified in seeking an order vacating that portion of the court's decision. If, on the other hand, there was no such agreement, the trial court would have been justified in denying the motion to vacate. However, the fact that the motion may have ultimately been determined to be without merit does not make it an invalid motion.

Placer Ranch contends the motion to vacate was invalid because the Authority failed to submit a proposed decision to replace the one to be vacated. However, Placer Ranch cites no authority requiring the moving party to present a proposed new decision. As stated previously, where a point is raised in an appellate brief without legal support, it is deemed to be without foundation and requires no discussion. (*Atchley v. City of Fresno*, *supra*, 151 Cal.App.3d at p. 647.)

Placer Ranch also argues that, because the Authority's motion to vacate challenged only the amount of fees and costs awarded, and not the entitlement to such an award, the deadline

for appealing the court's ruling on Placer Ranch's entitlement was not extended by the motion to vacate. And because this appeal challenges only the entitlement to fees and costs, Placer Ranch argues that the appeal is untimely in its entirety and must be dismissed.

Once again, Placer Ranch cites no authority for its contention. We are aware of no rule requiring a party who files a motion to vacate to raise all issues and challenge all aspects of the court's ruling in order to preserve those issues for appeal. This is not a matter of exhaustion of remedies. To accept Placer Ranch's argument would mean that a party with a valid basis for moving to vacate a portion of a judgment would have to appeal the other portions of the judgment immediately and then wait to appeal the remainder after resolution of the motion to vacate.

Placer Ranch argues the Authority is precluded from raising on appeal any issue not raised in the trial court. However, the issue of Placer Ranch's entitlement to fees and costs was raised in the Authority's opposition to Placer Ranch's motion for attorney fees.

Placer Ranch contends that the trial court issued two orders on October 16, 2001, one granting Placer Ranch's motion for attorney fees and one granting its motion to tax costs. Placer Ranch argues the Authority's motion to vacate addressed only the first of these orders. Therefore, the motion to vacate did not extend the time to appeal the order granting the motion to tax costs.

Again, we disagree. On October 16, 2001, the trial court issued a single "decision" with two parts. The Authority moved to vacate the entire decision. Although the Authority argued only that the amount of the award of attorney fees and costs was not proper, there is nothing in the Authority's memorandum in support of the motion to suggest the Authority intended to abandon its other arguments about the appropriateness of the decision as a whole. The court's decision on the motion to tax costs was intertwined with the decision on the motion for attorney fees and costs. Both were based on the court's conclusion that Placer Ranch was the prevailing party.

Placer Ranch contends that, assuming the Authority filed a valid motion to vacate, its notice of appeal was nevertheless untimely. Rule 3(b) requires that a notice of appeal be filed by the earliest of (1) 30 days after notice of an order denying the motion to vacate, (2) 90 days after notice of intention to move to vacate, or (3) 180 days after entry of judgment. The Authority filed its notice of intention to move to vacate on October 30, 2001. Ninety days after that date was January 28, 2002. According to Placer Ranch, the court's January 7, 2002 order "denied the majority of the relief sought by [the Authority] in its Motion to Vacate." Thirty days after that date was February 6, 2002. The Authority's notice of appeal was not filed until February 22, 2002. Thus, Placer Ranch argues, under either rule (3)(b)(1) or 3(b)(2), the Authority's notice of appeal was untimely.

The Authority counters that the trial court's January 7, 2002 order granted in part the Authority's motion to vacate and issued an entirely new decision replacing that of October 16. The Authority's February 22, 2002 notice of appeal was from the new decision issued on January 7, not the superseded decision of October 16. The Authority argues its appeal was timely because it had 60 days from the January 7 decision in which to file a notice of appeal. (See rule 2(a).)

The Authority has the better argument. On January 7, 2002, the trial court replaced the October 16, 2001 decision with a new and different one that deferred consideration of the *amount* of fees and costs until February 5, 2002. As of January 7, the October 16 decision was no longer viable and was not subject to appeal. The Authority appealed from the January 7 decision, and the follow-up decision of February 5. The notice of appeal from these later decisions was timely under rule 2(a).

II

Request to Strike Portions of Appellate Brief and Record

Placer Ranch contends the Authority's opening brief contains more than 50 factual statements that are not supported by proper record citations. Because of the magnitude of these unsupported statements, Placer Ranch asks that we strike the Authority's entire brief. In the alternative, Placer Ranch requests that we strike the unsupported statements or, "at the very least," disregard those statements.

Rule 14(a)(1)(C) requires that every appellate brief "support any reference to a matter in the record by a citation to the record." "It is the duty of a party to support the arguments in its briefs by appropriate reference to the record, which includes providing exact page citations." (*Bernard v. Hartford Fire Ins. Co.* (1991) 226 Cal.App.3d 1203, 1205.) Briefs that do not meet this requirement may be stricken. (*Ibid.*) In the alternative, those portions of the brief not properly supported by record citations may be stricken. (See *Ojavan Investors, Inc. v. California Coastal Com.* (1997) 54 Cal.App.4th 373, 391.)

Placer Ranch initially filed a separate motion to strike the Authority's opening brief, which we denied. In support of its motion, Placer Ranch submitted a copy of the Authority's brief, highlighting those portions purportedly containing factual assertions without proper citation. We have reviewed the highlighted brief and find that, while the unsupported factual assertions are numerous, they are hardly significant in light of the overall size of the brief. They do not warrant rejection of the entire document. We shall disregard all factual and procedural references in the Authority's opening brief that are not supported by proper record citations. (See *Warren-Guthrie v. Health Net* (2000) 84 Cal.App.4th 804, 808, fn. 4.)

Placer Ranch requests that we strike those portions of the Authority's opening brief that refer to matters and documents not before the trial court. Placer Ranch also requests that we

strike the corresponding portions of the record. In the alternative, Placer Ranch requests that we disregard those matters.

"As a general rule, documents not before the trial court cannot be included as a part of the record on appeal." (*Doers v. Golden Gate Bridge etc. Dist.* (1979) 23 Cal.3d 180, 184, fn. 1.) "[T]he function of the appellate court, in reviewing a trial court judgment on direct appeal, is limited to a consideration of matters contained in the record of trial proceedings, and that '[m]atters not presented by the record cannot be considered on the suggestion of counsel in the briefs.'" (*People v. Merriam* (1967) 66 Cal.2d 390, 396-397, fn. omitted, overruled on other grounds in *People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 882.) Matters referred to in an appellate brief that are not a proper part of the record on appeal may be stricken. (See *C.J.A. Corp. v. Trans-Action Financial Corp.* (2001) 86 Cal.App.4th 664, 673.)

Placer Ranch filed a separate motion to strike those portions of the Authority's opening brief that contain references to matters not before the trial court. We denied the motion. In support of that motion, Placer Ranch submitted a copy of the Authority's brief, highlighting those portions that purportedly contain the offending references. In opposition to the motion to strike, the Authority argued that the highlighted portions refer to matters and documents that *are* part of the record on appeal. The Authority refers to Placer Ranch's motion for attorney fees and motion to tax costs, both of which state

that they are based on, among other things, "the pleadings, files and records on file in this case." In light of the nature of the motions at issue, it is logical to include the entire court file for consideration.

In its opening appellate brief, Placer Ranch makes no attempt to counter the Authority's argument about what was before the trial court on the consolidated motions. Nor does Placer Ranch attempt to differentiate between those items referred to in the Authority's opening brief, that were in the court file at the time of the consolidated motions, and those that were not. We adhere to our earlier ruling and deny Placer Ranch's motion to strike.

III

The Private Attorney General Doctrine

Section 1021.5 codifies the private attorney general doctrine. It reads in relevant part: "Upon motion, a court may award attorneys' fees to a successful party against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest if: (a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons, (b) the necessity and financial burden of private enforcement . . . are such as to make the award appropriate, and (c) such fees should not in the interest of justice be paid out of the recovery, if any. . . ."

The private attorney general doctrine "rests upon the recognition that privately initiated lawsuits are often essential to the effectuation of the fundamental public policies embodied in constitutional or statutory provisions, and that, without some mechanism authorizing the award of attorney fees, private actions to enforce such important public policies will as a practical matter frequently be infeasible." (*Woodland Hills Residents Assn., Inc. v. City Council* (1979) 23 Cal.3d 917, 933.)

There are three prerequisites to recovery under section 1021.5: "(1) the action has resulted in the enforcement of an important right affecting the public interest, (2) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons, and (3) the necessity and financial burden of private enforcement make the award appropriate." (*Planned Parenthood v. Aakhus* (1993) 14 Cal.App.4th 162, 169-170 (*Planned Parenthood*).)

IV

Standard of Review

Whether a party seeking attorney fees has met the requirements of section 1021.5 is determined by the trial court, whose judgment will not be disturbed unless clearly wrong or an abuse of discretion. *Planned Parenthood*, *supra*, 14 Cal.App.4th at p. 170.) "[I]t is the task of the trial court to 'realistically assess the litigation and determine, from a practical perspective, whether or not the action served to

vindicate an important right . . . .'" (*Westside Community for Independent Living, Inc. v. Obledo* (1983) 33 Cal.3d 348, 354-355.) However, "trial court discretion is not unlimited. 'The discretion of a trial judge is not whimsical, uncontrolled power, but a legal discretion, which is subject to the limitations of legal principles governing the subject of its action, and to reversal on appeal where no reasonable basis for the action is shown. [Citation.]'" (*Id.* at p. 355.)

The scope of discretion is necessarily circumscribed by the legal principles governing the action. "Action that transgresses the confines of the applicable principles of law is outside the scope of discretion and we call such action an 'abuse' of discretion. [Citation.] If the trial court is mistaken about the scope of its discretion, the mistaken position may be 'reasonable,' i.e., one as to which reasonable judges could differ. [Citation.] But if the trial court acts in accord with its mistaken view the action is nonetheless error; it is wrong on the law." (*City of Sacramento v. Drew* (1989) 207 Cal.App.3d 1287, 1297-1298.) The question becomes "whether the grounds given by the court for its denial [or grant] of an award [of attorney fees] are consistent with the substantive law of section 1021.5 and, if so, whether their application to the facts of this case is within the range of discretion conferred upon the trial courts under section 1021.5, read in light of the purposes and policy of the statute." (*Id.* at p. 1298.)

V

The Catalyst Theory

On the question of whether the litigation resulted in the enforcement of an important right affecting the public interest, the trial court concluded that the lawsuit "triggered the changes in operation under the catalyst theory and was a substantial factor, combined with the administrative actions, in achieving the public benefit of correcting the landfill conditions."

The Authority contends the catalyst theory utilized by the court is no longer a valid basis for an award of attorney fees under section 1021.5. According to the Authority, the theory was recently discredited by the United States Supreme Court in *Buckhannon Home v. West Va. Dept.* (2001) 532 U.S. 598 [149 L.Ed.2d 855] (*Buckhannon*). Placer Ranch counters that the catalyst theory remains the law in California notwithstanding *Buckhannon*.

In *Northington v. Davis* (1979) 23 Cal.3d 955, the California Supreme Court indicated that "'voluntary' corrective action, induced by litigation, may properly be considered a 'benefit' of the litigation in determining the propriety of an attorney fee award." (*Id.* at p. 960, fn. 2.) Several years later, the court explained that "[t]he critical fact is the impact of the action, not the manner of its resolution." (*Folsom v. Butte County Assn. of Governments* (1982) 32 Cal.3d 668, 685.) According to the court, "[i]f the impact has been

the 'enforcement of an important right affecting the public interest' and a consequent conferral of a 'significant benefit on the general public or a large class of persons' a section 1021.5 award is not barred because the case was won on a preliminary issue [citation] or because it was settled before trial." (*Ibid.*, fn. omitted.) The question is whether the litigation substantially contributed to the result reached. (*Id.* at p. 686.)

In *Westside Community for Independent Living, Inc. v. Obledo*, *supra*, 33 Cal.3d at p. 353, the court stated that "an award of attorney fees may be appropriate were 'plaintiffs' lawsuit was a *catalyst* motivating defendants to provide the primary relief sought . . . ." Finally, in *Maria P. v. Riles* (1987) 43 Cal.3d 1281, the court explained: "An award of attorney fees under section 1021.5 is appropriate when a plaintiff's lawsuit '"was a *catalyst* motivating defendants to provide the primary relief sought"' or when plaintiff vindicates an important right '"by activating defendants to modify their behavior."'" (*Id.* at pp. 1291-1292.)

In *Buckhannon*, the United States Supreme Court concluded that the term "prevailing party" as used in attorney fees provisions of the Fair Housing Amendments Act of 1988 (42 U.S.C. § 3601 et seq.) and the Americans with Disabilities Act of 1990 (42 U.S.C. § 12101 et seq.) excludes use of the catalyst theory. The court noted that "prevailing party" is defined in Black's Law Dictionary as "'[a] party in whose favor a judgment is rendered.'" (*Buckhannon*, *supra*, 532 U.S. at p. 603 [149 L.Ed.2d

at p. 862].) The court then cited a number of earlier decisions in which awards have been approved based on consent decrees. The court explained that, "[i]n addition to judgments on the merits, we have held that settlement agreements enforced through a consent decree may serve as the basis for an award of attorney's fees. [Citation.] Although a consent decree does not always include an admission of liability by the defendant [citation], it nonetheless is a court-ordered 'chang[e] [in] the legal relationship between [the plaintiff] and the defendant.' [Citations.] These decisions, taken together, establish that enforceable judgments on the merits and court-ordered consent decrees create the 'material alteration of the legal relationship of the parties' necessary to permit an award of attorney's fees." (*Id.* at p. 604, fn. omitted [149 L.Ed.2d at pp. 862-863].) According to the court, "the 'catalyst theory' falls on the other side of the line from these examples. It allows an award where there is no judicially sanctioned change in the legal relationship of the parties. . . . A defendant's voluntary change in conduct, although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit, lacks the necessary judicial *imprimatur* on the change." (*Id.* at p. 605 [149 L.Ed.2d at p. 863].)

Although *Buckhannon* dealt with the right to attorney fees under federal statutes that are not at issue here, the California Supreme Court decisions adopting the catalyst theory noted that, in framing the private attorney general doctrine, the courts and Legislature relied on federal authorities. (See

Maria P. v. Riles, *supra*, 43 Cal.3d at p. 1290; *Folsom v. Butte County Assn. of Governments*, *supra*, 32 Cal.3d at p. 682.) The question of whether the catalyst theory has any remaining viability in California in light of *Buckhannon* is currently before the Supreme Court in *Graham v. DaimlerChrysler Corp.* (Dec. 4, 2003, S112862) ___ Cal.4th ___ [2004 Cal. Lexis 7442]. In this matter, we need not decide the issue. As we shall explain, Placer Ranch's claim for attorney fees falls short because Placer Ranch's personal stake in the litigation exceeded the financial burden of bringing the action.

VI

Financial Burden

Assuming Placer Ranch satisfied the first two requirements for an award of attorney fees under section 1021.5, it was also required to establish that "the necessity and financial burden of private enforcement . . . are such as to make the award appropriate." (§ 1021.5, subd. (b).) "This statutory element requires that the cost of litigation to [the claimant] be disproportionate to [the claimant]'s individual stake in the outcome. [Citation.] This criterion is met when the cost of the claimant's legal victory transcends his personal interest in the subject of the suit." (*Planned Parenthood*, *supra*, 14 Cal.App.4th at pp. 172-173.)

In *California Licensed Foresters Assn. v. State Bd. of Forestry* (1994) 30 Cal.App.4th 562 (*California Licensed Foresters*), we explained that entitlement to an attorney fees

award under section 1021.5 turns on a comparison of the litigant's private interests with the anticipated costs of suit. (*Id.* at p. 570.) We noted: "Section 1021.5 is intended as a 'bounty' for pursuing public interest litigation, not a reward for litigants motivated by their own interests who coincidentally serve the public. [Citations.] 'The private attorney general theory recognizes citizens frequently have common interests of significant societal importance, but which do not involve any individual's financial interests to the extent necessary to encourage private litigation to enforce the right. [Citation.] To encourage such suits, attorneys fees are awarded when a significant public benefit is conferred through litigation pursued by one whose personal stake is insufficient to otherwise encourage the action." (*Ibid.*)

In *Schwartz v. City of Rosemead* (1984) 155 Cal.App.3d 547, California Federal Savings and Loan Association obtained approval to construct a cogeneration plant on land adjacent to that owned by the plaintiff and the plaintiff filed suit to stop construction. The plaintiff obtained partial relief based on a violation of the California Environmental Quality Act and sought attorney fees. The trial court denied relief, concluding the cost of litigation was not out of proportion to the plaintiff's individual stake in the action, notwithstanding that the public also benefited from the action. (*Id.* at pp. 550-554.)

The Court of Appeal affirmed. The appellate court concluded the trial court's findings that the plaintiff brought the action to protect its own property interests and that the

cost of litigation was not out of proportion to the plaintiff's individual stake in the action were supported by substantial evidence. (*Schwartz v. City of Rosemead, supra,* 155 Cal.App.3d at p. 559.) According to the Court of Appeal: "Appellant's own estimation of the value of his property was $700,000, and that the cogeneration plant would diminish his property value by $100,000. He claimed $22,000 in attorneys fees in obtaining the writ. Given these amounts and the evidence of appellant's motive in initiating the suit, we find no abuse of discretion in the trial court's denial of attorneys fees on the basis of the third requirement of section 1021.5." (*Id.* at p. 560.)

In *Christward Ministry v. County of San Diego* (1993) 13 Cal.App.4th 31, the owner of a 640-acre retreat adjacent to a landfill petitioned for a writ of mandate challenging the adequacy of an environmental impact report (EIR) for a planned expansion of the landfill. The trial court granted the petition in part but denied attorney fees, and the Court of Appeal affirmed. (*Id.* at pp. 36-39, 50.) The appellate court concluded substantial evidence supported the trial court's conclusion that the plaintiff's private interests motivated the action even though the public was also benefited. (*Id.* at p. 49-50.)

In *California Licensed Foresters*, *supra*, 30 Cal.App.4th 562, the plaintiff filed suit against the State Board of Forestry challenging the Board's emergency regulations, which allegedly increased the requirements for obtaining approval of a timber harvest plan (THP) and shifted the emphasis of the Forest

Practice Act from production of lumber to protection of wildlife. The plaintiff, a nonprofit association of registered professional foresters and related professionals who provide services in connection with the preparation of THP's, claimed the regulations adversely affected the livelihood of its members. (*Id.* at p. 567.) After the adoption of permanent regulations, the plaintiff filed a request for voluntary dismissal and then sought and obtained an award of attorney fees in the amount of $42,940. (*Id.* at p. 568.)

We reversed the award of attorney fees, explaining: "In its representative capacity, CLFA [(California Licensed Foresters Association)] had a financial stake in pursuing this matter to the same extent as its members. CLFA's very existence depends upon the economic vitality of its members and any benefit or burden derived by CLFA from this lawsuit ultimately redounds to the membership. . . ." (*California Licensed Foresters, supra*, 30 Cal.App.4th at p. 570.) We continued: "CLFA is an association of professionals providing services to the timber industry. The livelihood of CLFA members is largely dependent upon the continued harvesting of timber which in turn hinges on the requirements for THP's and the restrictions on harvesting imposed by the Board in its rules and regulations. If . . . the emergency regulations would have suspended the preparation of THP's and the harvesting of timber during the 120 days they were in effect, the income of CLFA members would have been reduced significantly. This temporary elimination of business might also have had permanent adverse effects. These

are significant pecuniary concerns to CLFA and its members and, in relation to the costs of litigation, require no further incentive for bringing suit." (*Id.* at pp. 571-572.)

In *Rich v. City of Benicia* (1979) 98 Cal.App.3d 428, the plaintiff sued the city and several individuals to compel preparation of an EIR for the proposed conversion of a residential house to commercial and multiple-residential purposes. The parties entered into a stipulation that the city would prepare an EIR in accordance with specified procedures. The trial court thereafter awarded attorney fees to the plaintiff under the private attorney general doctrine. (*Id.* at pp. 431-432.)

The Court of Appeal affirmed. On the issue of financial burden, the court explained that "the trial court clearly perceived a need to overcome 'a major obstacle, the expense of hiring legal counsel,' in order to encourage private enforcement by suits of this kind in the public interest." (*Rich v. City of Benicia, supra,* 98 Cal.App.3d at p. 437.) The appellate court found the trial court's award of attorney fees was within the scope of its discretion. (*Ibid.*)

In *Planned Parenthood*, *supra*, 14 Cal.App.4th 162, a medical clinic filed suit against anti-abortion demonstrators for damages, injunctive relief, and attorney fees, and the parties stipulated to a judgment permanently enjoining certain activities on the clinic's property. The court thereafter awarded the clinic attorney fees under section 1021.5. (*Id.* at pp. 167-169.)

The Court of Appeal affirmed. On the issue of financial burden, the court indicated the clinic had received no monetary recovery in the lawsuit. (*Planned Parenthood*, *supra*, 14 Cal.App.4th at p. 173.) As to the defendants' argument that the clinic had a sufficient business motive to file suit, the court agreed, but explained: "[T]his does not mean that the effects of respondent's suit should be interpreted solely as a private success story. The interests of respondent and its clients, rendering and receiving reproductive medical care, are mutual and inseparable. This action was brought to protect both respondent and its patrons; consequently, it cannot be exclusively characterized as a self-serving, private dispute commenced by respondent to protect its own pocketbook." (*Ibid.*)

In *Galante Vineyards v. Monterey Peninsula Water Management Dist.* (1997) 60 Cal.App.4th 1109 (*Galante Vineyards*), several vineyards filed a petition for writ of mandate challenging the EIR of a dam construction project in their area. (*Id.* at pp. 1113-1114, 1116.) Despite recognizing that the plaintiffs had a personal financial stake in the outcome of the litigation, the trial court granted attorney fees, but reduced them by 50 percent. (*Id.* at p. 1126.)

The Court of Appeal affirmed the award. The court explained: "In the present action, petitioners Galante Vineyards, Rancho Galante, Bernardus, and Durney Vineyards are probably the greatest beneficiaries of the writ ordering a focused supplemental EIR on viticultural issues. However, there is no direct pecuniary benefit to petitioners in the judgment.

In addition, any future money advantage for petitioners is speculative. Both these factors tend to favor a grant of attorney's fees. [Citation.] Thus, the question of whether the cost of petitioners' legal victory transcends their personal interests was a close one." (*Galante Vineyards, supra,* 60 Cal.App.4th at pp. 1127-1128.)

As to the reduction of the fees awarded, the court indicated: "We find no abuse of discretion in the trial court solving this problem [of the closeness of the issue] by doing what the District suggested in its opposition to petitioners' motion for attorney's fees; i.e., reducing fees to reflect the financial interest of four of the six petitioners. To the extent that the District is arguing it was improper to award any fees prior to reaching a determination on the third prerequisite to an award of fees under the private attorney general doctrine, it has invited the error." (*Galante Vineyards, supra,* 60 Cal.App.4th at p. 1128.)

Placer Ranch contends it "has derived no pecuniary benefit as a result of motivating [the Authority] to contain the Landfill's contaminants on its own property as required under environmental regulations." According to Placer Ranch, "the value of [its] property has not been affected by maintaining *status quo* by preventing [the Authority] to allow [*sic*] migration of contaminants onto [Placer Ranch's] property as a result of this litigation. Further, any future money advantage for [Placer Ranch] is wholly speculative."

While we respect the ingenuity of Placer Ranch's "no pecuniary benefit" argument, we nevertheless reject it. Placer Ranch's argument that it derived no financial benefit from preventing a private nuisance and a trespass of contaminants onto its property defies logic. To the extent Placer Ranch has prevented a diminution in the value of its property by forcing modification of the Landfill operation, it has derived a financial benefit. The benefit Placer Ranch obtained is no different than if the contamination had already occurred and Placer Ranch obtained a money judgment for the diminution in value of its property. The benefit here was the avoidance of detriment.

As to the speculative nature of the loss avoided, it takes little imagination to conceive that Placer Ranch has gained considerably more than the attorney fees and costs incurred in this action by forcing the Authority to operate in such a way as to avoid contamination of adjoining properties. Stanford Ranch West consists of approximately 2,300 acres intended for mixed-use development that is directly adjacent to the Landfill. The original complaint alleged that the Landfill "has caused repeated instances of noise, dust, litter, odor, and other adverse consequences to adjacent property . . . ." It further alleged that the plaintiffs "have experienced the diminution in value of their property as a result of repeated actions by defendants that have created a public perception that the current operations of the Landfill are incompatible with certain uses of [Stanford Ranch West]." In their private nuisance

claim, the plaintiffs alleged the Landfill "is creating a nuisance causing substantial and unreasonable inference [*sic*] with plaintiffs' use and enjoyment of their property . . . ." They further alleged that "the Landfill is receiving hazardous wastes which cause a threat, or a future threat, of groundwater and other contamination." The plaintiffs claimed harm "in that they have been hampered in planning the development of their property as a residential development and have lost substantial value in their property . . . ." Other claims in the complaint are of a similar nature.

The fifth amended complaint also alleged a diminution in value of adjoining property due to the unlawful operation of the Landfill. The first cause of action alleged: "The Landfill is creating and has created a nuisance by causing substantial and unreasonable inference [*sic*] with plaintiff's and plaintiff's predecessors' use and enjoyment of their property in that defendants have allowed noise, dust, litter, migrating gas and other pollutants, unpleasant odor, and diminution in air quality to emanate from the Landfill and intrude onto adjacent land owned by and/or controlled by plaintiff or its predecessors." It further alleged that the Landfill is accepting hazardous waste "which causes a threat, or a future threat, of groundwater and other contaminants." Placer Ranch claimed it had been harmed in that it has been hampered in planning the development of its property and has lost substantial value of its property. Further, because of the proximity of Stanford Ranch West to the Landfill, Placer Ranch claimed it had suffered special damage

"in the form of unusually high concentrations of noise, dust, litter, unpleasant odor and diminution in air quality on its land."

In addition to the allegations of the complaints, the Authority points out that on February 17, 1994, four months before this action was filed, Placer Ranch sent the Authority a notice of claim letter asserting that unlawful operation of the Landfill was causing it damages in excess of $100 million. Placer Ranch argues that "[t]his is a complete misrepresentation of the Notice of Claim filed by [it] in February of 1994." According to Placer Ranch, a "closer examination" of the notice shows the $100 million claim referred to imposition of a one-mile buffer zone around the Landfill, "which was the subject of [Placer Ranch]'s challenge to the County's General Plan in *another* lawsuit [citation], and had nothing to do with [Placer Ranch]'s Lawsuit against [the Authority] to abate the public nuisance caused by negligent operations at the Landfill."

Placer Ranch misstates the nature of the notice and this lawsuit. This lawsuit was not one solely "to abate the public nuisance caused by negligent operations at the Landfill." As described earlier, the original complaint contained many other causes of action, including private nuisance, trespass, negligence, inverse condemnation, a taking, and various regulatory violations. Placer Ranch's notice stated that "noise, dust, odor, diminution in air quality, wind blown trash, solid waste lost from vehicles delivering material to the site and illegal dumping generated by operation of the Landfill have

been uncontrolled and/or negligently allowed to emanate from the Landfill and intrude onto adjacent land owned by and/or controlled by Stanford Ranch, Inc." This mirrors allegations contained in various places in the original complaint and fifth amended complaint. The notice also demanded that these activities stop. While the notice complained of a buffer zone around the Landfill, the original complaint also contained causes of action for inverse condemnation and taking due to the imposition of a buffer zone. Attached to the notice was a table showing the "Summary of Damages" caused by buffer zones of various sizes. A 1,000-foot buffer was asserted to result in a taking of $6.8 million in property value.

Placer Ranch nevertheless argues that, like the plaintiffs in *Planned Parenthood*, their interests were "inexorably intertwined" with those of the surrounding community. Furthermore, like the plaintiff in *Rich v. City of Benicia*, Placer Ranch took the leading role in litigation that would serve to benefit the local community.

We are not persuaded. Unlike the plaintiffs in *Planned Parenthood*, Placer Ranch filed suit to protect the integrity of its property interest rather than the rights of others. Landowners with property adjacent to the Landfill and the public in general were benefited only coincidentally by Placer Ranch's actions. In *Rich v. City of Benicia*, the trial court implicitly found that the private financial incentive to the plaintiff in bringing the action was insufficient to overcome the expense of litigation. Here, no such finding is implied. Nor would such

finding be reasonable in light of the size of Placer Ranch's personal stake in protecting its property interests.

As the moving party, Placer Ranch had the burden of establishing all of the elements necessary for an award of attorney fees under the private attorney general doctrine. This required proof that the financial burden of litigation exceeded Placer Ranch's stake in the action. (See *Beach Colony II v. California Coastal Com.* (1985) 166 Cal.App.3d 106, 113.)

In its memorandum in support of the motion for attorney fees, Placer Ranch argued that it had "a *de minimus* financial stake in this matter." Placer Ranch argued, "the actual cost of its enforcement efforts against [the Authority] has far exceeded its expected benefit . . . ." As support for this assertion, Placer Ranch cited the declaration of Holly Tiche, the vice-president and assistant secretary of Placer Ranch. However, nowhere in that declaration does Tiche say anything about the relationship between legal expenses and the benefits Placer Ranch expected to derive from the litigation. Placer Ranch further argued the litigation was essentially equitable in nature, such that damages were not an issue. However, this is belied by the claims of diminution in value and the causes of action for inverse condemnation and violation of civil rights (i.e., a taking claim).

In its ruling below, the trial court made no express determination that the cost of litigation exceeded Placer Ranch's stake in the case. The Authority requested the court to make a finding on the issue, but the court declined. Placer

Ranch has cited nothing in the record to support such a finding. On the contrary, given the size of Placer Ranch's property interest and the allegations of the complaint, it appears Placer Ranch had a significant personal stake in this matter. Thus, a bounty for pursuing the litigation is unwarranted.

VII

Section 1032 Costs

The Authority contends that it is entitled to costs of suit under section 1032, because a dismissal was entered in its favor. The trial court granted Placer Ranch's motion to tax costs, concluding that Placer Ranch, rather than the Authority, was the prevailing party.

"Code of Civil Procedure section 1032 permits the recovery of costs by the prevailing party. As used in this section, 'prevailing party' includes 'the party with a net monetary recovery, a defendant in whose favor a dismissal is entered, a defendant where neither plaintiff nor defendant obtains any relief, and a defendant as against those plaintiffs who do not recover any relief against that defendant. When any party recovers other than monetary relief and in situations other than as specified, the "prevailing party" shall be as determined by the court, and under those circumstances, the court, in its discretion, may allow costs or not and, if allowed may apportion costs between the parties on the same or adverse sides . . . .' (Code Civ. Proc., § 1032, subd. (a)(4).)" (*Olsen v. Breeze, Inc.* (1996) 48 Cal.App.4th 608, 627.) The inquiry into who was

the prevailing party under this provision "is fact intensive" and therefore requires "considerable deference to the fully informed determinations of the trial court." (*Sears v. Baccaglio* (1998) 60 Cal.App.4th 1136, 1155.) "[I]n determining litigation success, courts should respect substance rather than form, and to this extent should be guided by 'equitable considerations.'" (*Hsu v. Abbara* (1995) 9 Cal.4th 863, 877, italics omitted.)

The Authority contends that it was the prevailing party because it was "a defendant in whose favor a dismissal is entered." (§ 1032, subd. (a)(4).) According to the Authority, a *voluntary* dismissal is a "dismissal" within the meaning of this provision. Placer Ranch counters that it was the prevailing party because it achieved the "primary relief" sought in the action.

In *Olsen v. Breeze, Inc.*, *supra*, 48 Cal.App.4th 608, the plaintiff sued various ski equipment providers challenging the language in releases of liability that the providers required equipment users to sign. During the pendency of the litigation, several of the defendants modified the language of their releases and then obtained summary judgment. The court awarded costs to these defendants. (*Id.* at pp. 615-617.) The plaintiff appealed, contending he was the prevailing party because the lawsuit "was the catalyst forcing those defendants to modify their releases to conform to law." (*Id.* at p. 627.) We disagreed, explaining: "Under the definition provided in Code of Civil Procedure section 1032, where other than monetary

relief is obtained, the prevailing party is as determined by the court and the court may, in its discretion, apportion costs. In this instance, defendants were prompted to modify their releases only marginally, whereas plaintiff sought to outlaw the use of releases altogether. On this basis, the superior court concluded defendants were the prevailing parties and awarded costs accordingly. This conclusion is supported by the record." (*Ibid.*)

Similarly, here, evidence was presented that the litigation was the catalyst causing the Authority to modify the operation of the Landfill to avoid injury to adjoining property. Placer Ranch thereby achieved the protection of its property interests. The Authority contends the evidence supporting Placer Ranch's catalyst theory is tenuous. The Authority argues that corrective actions were taken in response to regulatory proceedings unrelated to the litigation and on which Placer Ranch's input had little if any impact.

This is essentially an attack on the sufficiency of the evidence to support the trial court's conclusion that the litigation was a catalyst for the corrective actions taken by the Authority. However, in making this assertion, the Authority ignores evidence supporting the trial court's conclusion and provides no explanation for why that evidence is insufficient. A party challenging the sufficiency of the evidence must summarize the evidence on the point, both favorable and unfavorable. (*Roemer v. Pappas* (1988) 203 Cal.App.3d 201, 208.)

Failure to do so may be considered a waiver. (*Oliver* v. *Board of Trustees* (1986) 181 Cal.App.3d 824, 832.)

Because there is evidence to support the trial court's conclusion that the litigation was at least a contributing factor in bringing about the changes in operation of the Landfill, and therefore that Placer Ranch obtained some nonmonetary relief, the question of who was the prevailing party was subject to determination by the trial court. (§ 1032, subd. (a)(4).) We defer to the fully informed conclusion of the trial court that Placer Ranch was the prevailing party in this regard.

VIII

Section 998 Offer

The Authority contends it is entitled to costs incurred after Placer Ranch failed to accept its section 998 offer of settlement. In January 1997, the Authority made a section 998 offer to settle for $200,000. Placer Ranch did not accept the offer. The Authority contends that because Placer Ranch dismissed the action without obtaining any monetary relief, the Authority obtained a result more favorable than the settlement offer and, therefore, the Authority is entitled to costs incurred after Placer Ranch failed to accept the settlement offer. The trial court concluded the Authority is not entitled to such costs because its settlement offer was not reasonable.

Section 998 reads in relevant part:

"(a) The costs allowed under Sections 1031 and 1032 shall be withheld or augmented as provided in this section.

"(b) Not less than 10 days prior to commencement of trial or arbitration . . . , any party may serve an offer in writing upon any other party to the action to allow judgment to be taken or an award to be entered in accordance with the terms and conditions stated at that time. [¶] . . . [¶]

"(c)(1) If an offer made by a defendant is not accepted and the plaintiff fails to obtain a more favorable judgment or award, the plaintiff shall not recover his or her postoffer costs and shall pay the defendant's costs from the time of the offer. In addition, in any action or proceeding other than an eminent domain action, the court or arbitrator, in its discretion, may require the plaintiff to pay a reasonable sum to cover costs of the services of expert witnesses, who are not regular employees of any party, actually incurred and reasonably necessary in either, or both, preparation for trial or arbitration, or during trial or arbitration, of the case by the defendant."

In *Elrod v. Oregon Cummins Diesel, Inc.* (1987) 195 Cal.App.3d 692, at page 696, we indicated section 998 contains an implicit good faith requirement. "The purpose of section 998 is to encourage the settlement of litigation without trial. [Citation.] To effectuate the purpose of the statute, a section 998 offer must be made in good faith to be valid. [Citation.] Good faith requires that the pretrial offer of settlement be 'realistically reasonable under the circumstances of the particular case. Normally, therefore, a token or nominal offer will not satisfy this good faith requirement, . . .'

[Citation.] The offer 'must carry with it some reasonable prospect of acceptance. [Citation.]' [Citation.] One having no expectation that his or her offer will be accepted will not be allowed to benefit from a no-risk offer made for the sole purpose of later recovering large expert witness fees. [Citation.]" (*Jones v. Dumrichob* (1998) 63 Cal.App.4th 1258, 1262-1263.)

The award of costs under section 998 is within the trial court's discretion. (*Culbertson v. R. D. Werner Co., Inc.* (1987) 190 Cal.App.3d 704, 711.) When a party obtains a judgment more favorable than its pretrial offer, it is presumed to have been reasonable and the opposing party bears the burden of showing otherwise. (*Nelson v. Anderson* (1999) 72 Cal.App.4th 111, 134.) "Even a modest or 'token' offer may be reasonable if an action is completely lacking in merit." (*Ibid*.) On appeal, the losing party bears the burden of establishing the trial court abused its discretion. (See *Blank v. Kirwan* (1985) 39 Cal.3d 311, 331.)

The trial court's conclusion that the Authority's offer to settle was not reasonable assumed that the Authority received a more favorable result in the litigation following the offer than if the offer had been accepted. Without a more favorable result, reasonableness of the offer is not an issue. However, Placer Ranch sought more than monetary relief in the litigation. In light of Placer Ranch's claim that the benefit it received was improvement of the Landfill operations, the trial court's assumption of a more favorable result may not have been

warranted. The question turns on the cost of the improvements to Landfill operations and when they occurred. If, following rejection of the settlement offer, the Authority was required by the litigation to make changes that cost more than $200,000, it did not receive a more favorable outcome.

At any rate, the question of whether the offer was reasonable necessarily turns on the circumstances existing at the time of the offer, as reasonably known to Placer Ranch. (*Elrod v. Oregon Cummins Diesel, Inc.*, *supra*, 195 Cal.App.3d at p. 699.) "[T]he section 998 mechanism works only where the offeree has reason to know the offer is a reasonable one. If the offeree has no reason to know the offer is reasonable, then the offeree cannot be expected to accept the offer." (*Ibid.*)

The Authority's settlement offer was made on January 19, 1997. The offer expired without having been accepted 30 days later. (See § 998, subd. (b)(2); *Elrod v. Oregon Cummins Diesel, Inc.*, *supra*, 195 Cal.App.3d at p. 696.) From the record citations provided by the parties, we cannot determine whether the Authority had taken any corrective actions prior to this time. Deposition testimony was presented from 1997 and 1998 that certain corrective action had been taken, but the exact date is not stated. Other evidence in the record suggests corrective action was taken after the settlement offer. Nor can it be determined what further corrective action or other benefit Placer Ranch might reasonably have anticipated from the litigation.

The Authority asserts that its section 998 offer "was reasonable because it was based on the Authority's reasonable prediction that Placer Ranch would lose its claims if brought to trial." However, the Authority cites nothing in the record to support its assertion that it believed at the time that Placer Ranch would lose the case. Furthermore, the assertion is belied by the fact that the Authority took corrective actions around the time the settlement offer was being rejected. The Authority further argues that Placer Ranch admitted it had a weak case by acknowledging that, at the time the suit was filed, Placer Ranch believed it had only a 50 percent chance of success. As we see it, a 50 percent chance of success is even odds, not a weak case.

As stated previously, the losing party on a section 998 ruling bears the burden of establishing that the trial court abused its discretion. (*Blank v. Kirwan*, *supra*, 39 Cal.3d at p. 331.) The Authority failed to satisfy its burden here. Given the enormous stake Placer Ranch had in the development of its property, which development might have been prevented or at least curtailed by the Landfill operations, we cannot say the trial court abused its discretion in concluding a settlement offer of only $200,000 was not reasonable.

IX

Conclusion

Because Placer Ranch had a sufficient personal stake in the protection of its property interests to pursue the litigation,

it is not entitled to an award of attorney fees under the private attorney general doctrine. While the results reached through improvement of the Landfill operations may have inured to the benefit of other adjoining landowners or the public at large, this was only coincidental. Thus, the trial court erred in awarding Placer Ranch attorney fees pursuant to section 1021.5. Having so concluded, we need not address the Authority's other arguments for setting aside the attorney fees award or Placer Ranch's cross-appeal seeking additional fees.

On the issue of costs, substantial evidence supports the trial court's conclusion that Placer Ranch was the prevailing party, and the trial court did not abuse its discretion in concluding that the Authority's section 998 offer was not reasonable.

DISPOSITION

The January 7 and February 5, 2002 orders are reversed insofar as they award Placer Ranch attorney fees. Those orders are affirmed on the issue of costs. The matter is remanded to the trial court to enter a new order denying Placer Ranch's section 1021.5 motion for attorney fees and awarding Placer Ranch costs of suit in the amount of $636,624.01. The parties shall bear their own costs on appeal.

HULL, Acting P.J.

We concur:

ROBIE, J.

BUTZ, J.